

IBM Agreement for the Support of DirectTalk and Callpath Software Solutions

Agreement for Acquisition of Programs and Support for DirectTalk and Callpath for AIX

This IBM Agreement for Acquisition of Programs and Support (called the "Agreement") governs your acquisition of 1) Programs, licensed under the IBM International Program License Agreement (IPLA), and 2) Support, both listed on an IBM Order Form. The term "Support" means support we make available to you, under the terms of this Agreement, for current releases of selected Programs listed in the Addendum for Support for Universal Access Programs. An "Enterprise" in this Agreement is any legal entity (such as a corporation) and the subsidiaries it owns by more than 50 percent.

The Customer Lead Company and IBM Lead Company agree to coordinate the activities of the Customer Companies ("you") and IBM Companies ("we") in their respective Enterprises, under this Agreement.

This Agreement is written in English and both the Lead Companies agree to be bound by its terms. The Lead Companies will distribute copies of the Agreement to their respective Companies. In the event that any of your Companies wish to obtain products or services pursuant to this Agreement, the respective Company will acknowledge acceptance of these terms through a Transaction Document which incorporates this Agreement by reference. This Agreement and its applicable Attachments and Transaction Documents are the complete agreement between us regarding these transactions, and replace any prior oral or written communications between us regarding these transactions. By signing below, both of us agree to the terms of this Agreement. Once signed, 1) unless prohibited by local law or specified otherwise, any photocopy or facsimile reproduction of this Agreement or Transaction Document is considered an original and 2) all Programs and Support ordered under this Agreement are subject to it.

Agreed to:
Customer Lead Company
Lead Company name: FACS Group, Inc.

By Amy L. Hanson

Authorized signature

Name (type or print):
Amy L. Hanson
Date: 6/8/01
Customer Lead Company address:
9111 Duke Blvd
Mason, Ohio 45040

Agreed to:
IBM Lead Company
Lead Company name: IBM Corporation

By

Authorized signature

Stephanie Morfin
Name (type or print):
Stephanie Morfin
Date: 6/18/01
Agreement number:

SW010524
IBM Lead Company address:

1005 LBJ Freeway
DALLAS TX 75234

After signing, please return this Agreement to the "IBM address" shown above.

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IBM Agreement for Acquisition of Programs and Support

Part I - General

1. Agreement Structure

Some Programs and Support have terms in addition to those we specify in this Agreement. We provide the additional terms in documents called "Attachments" which are also part of this Agreement. Depending upon their country of use, Attachments may have different names.

Transaction Documents

For each business transaction, you will receive the appropriate "Transaction Documents" that confirm the specific details of the transaction. The following are examples of IBM Transaction Documents, with examples of the information they may contain:

1. order form
2. addenda to Attachments (eligible Programs, types of Support, additional terms); and
3. invoices (item, quantity, and amount due).

Conflicting Terms

If there is a conflict among the terms in the various documents, those of a Transaction Document prevail over those of this Agreement.

Acceptance of Your Order

Programs and Support become subject to this Agreement when this Agreement is fully executed.

Your Acceptance of Additional Terms

You accept the additional terms in an IBM Transaction Document by signing the IBM Transaction Document.

2. Charges and Payment

When you acquire Programs and Support from us, the following applies:

Amounts are due upon receipt of invoice and payable as specified in a Transaction Document. You agree to pay each undisputed invoice within thirty (30) days of receipt, including any late payment fee. Depending on the particular Program, Support, or circumstance, additional charges may apply (such as special handling). We will inform you in advance whenever additional charges apply. If any authority imposes a duty, tax, levy or fee, excluding those based on IBM's net income upon any Program or Support we supply under this Agreement, then you agree to pay that amount as specified in the invoice or supply exemption documentation. In the event that you overpay any such taxes, levies or fees, we agree to assist you in obtaining a refund of such overpayments. We may increase one-time charges for Programs or Support upon thirty (30) days prior written notice. However, an increase to one-time charges will not apply to you if 1) we receive your signed Order before the announcement date of the increase and 2) you have requested that we make the Program or authorization available to you or provide Support within three months after our receipt of the signed Order Form.

We may increase recurring charges for Support by giving you three months' written notice. An increase applies on the first day of the invoice or billing period on or after the effective date we specify in the notice. Notwithstanding the foregoing, increases in charges for Support will not be increased more than one time during each Support Period and any such increase shall not exceed three percent (3%) of the prior charge for Support. You receive the benefit of a decrease in charges for amounts which become due on or after the effective date of the decrease.

3. Mutual Responsibilities

Both of us agree that under this Agreement:

1. neither of us grants the other the right to use its (or any of its Enterprise's) trademarks, trade names, or other designations in any promotion or publication without prior written consent;
2. except as otherwise agreed to in writing, all information exchanged is nonconfidential. If either of us requires the exchange of confidential information, it will be made under a signed confidentiality agreement;
3. each may communicate with the other by electronic means and such communication is acceptable as a signed writing to the extent permissible under applicable law. An identification code (called a "user ID") contained in an electronic document is sufficient to verify the sender's identity and the document's authenticity;
4. we may provide Programs and Support through a telecommunications link;

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5. each will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations;
6. neither of us will bring a legal action more than two years after the cause of action arose unless otherwise provided by local law without the possibility of contractual waiver of limitation; and
7. neither of us is responsible for failure to fulfill any obligations due to causes beyond its control. Notwithstanding the foregoing, the party whose obligation has not been met shall use commercially reasonable efforts to remedy such failure as soon as commercially feasible.

4. Your Responsibilities

You agree:

1. to provide access into your existing RS6000 DirectTalk and Callpath systems either through the system supplied modem or an asynchronous external modem attached to your systems at your location if Programs or Support are provided through a telecommunications link (including appropriate Federated passwords to gain system access);
2. not to assign, or otherwise transfer, this Agreement or your rights under this Agreement, or delegate your obligations, without our prior written consent. Any attempt to do so is void. Notwithstanding the foregoing, You may assign this Agreement to an affiliate upon notice to IBM. For the purposes of this Agreement, an Affiliate is any entity which is 51% or more owned or controlled by Federated Department Stores, Inc.;
3. to acquire Programs with the intent to use them solely within your Enterprise and not for reselling or otherwise transferring Programs, unless you acquire them without an discount or allowance. Notwithstanding the foregoing, we agree that you may use the Programs to provide services to your affiliates, customers and/or clients.
4. to comply with all applicable export and import laws and regulations.

5. Limitation of Liability

Circumstances may arise where, because of a default on our part or other liability, you are entitled to recover damages from us. In each such instance, regardless of the basis on which you are entitled to claim damages from us (including fundamental breach, negligence misrepresentation, or other contract or tort claim), we are liable for no more than:

1. damages for bodily injury (including death) and damage to real property and tangible personal property; and
2. the amount of any other actual direct damages up to the greater of U.S. \$100,000 or the charges (if recurring, 12 months' charges apply) for the Program or Support that is the subject of the claim.
3. patent and copyright claims, as provided below.

This limit also applies to any of our IBM Business Partners, subcontractors and Program developers unless otherwise agreed in writing. It is the maximum for which we and our IBM Business Partners, subcontractors and Program developers are collectively responsible.

Your liability to us and our subcontractors is limited to:

1. damages for bodily injury (including death) and damages to real property and tangible personal property; and
2. the amount of any other actual direct damages up to the greater of U.S. \$100,000 or the charges (if recurring, 12 months' charges apply) for the Program or Support that is the subject of the claim.

This limit is the maximum for which you are liable to us, our subcontractors, and Program developers.

If a third party claims that an IBM Program or Support we provide to you infringes that party's patent or copyright, we will defend you against that claim at our expense and pay all costs, damages, and attorney's fees that a court finally awards, provided that you: promptly notify us in writing of the claim; and allow us to control, and cooperate with us in, the defense and any related settlement negotiations.

If such a claim is made or appears likely to be made, you agree to permit us to enable you to continue to use the IBM Program or Support, or to modify it, or replace it with one that is at least functionally equivalent. If we determine that none of these alternatives is reasonably available, you agree to return the Program to us on our written request. We will then give you a credit equal to the amount paid by you or 12 months' charges (whichever is less).

This is our entire obligation to you regarding any claim of infringement.

Claims for Which We are Not Responsible

We have no obligation regarding any claim based on any of the following: anything you provide which is incorporated into a Program; your modification of a Program, or a Program's use in other than its specified operating environment; the combination, operation, or use of a Program with other Programs not provided by us as a system, or the combination, operation, or use of a Program with any product, data, or apparatus that we did not provide; or infringement by a non-IBM Program alone, as opposed to its combination with Program we provide to you as a system.

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Source Code

In the event that we become insolvent and are no longer providing Support to you, we agree to discuss appropriate arrangements with you (including, possibly, the provision of a copy of the source code for Products you have licensed) so that you may support the Products you have licensed.

Items for Which We are Not Liable

Under no circumstances are we, our IBM Business Partners, subcontractors, or Program developers liable for any of the following:

1. third-party claims against you for damages (other than those under the first item listed above (injury and property damage) and claims for patent and copyright infringement as outlined above);
2. loss of, or damage to, your records or data, although in cases where such loss or damage is our fault, we will perform or pay the restoration of data from a backup system, provided that you have performed backups in a proper and timely manner; or
3. special, incidental, or indirect damages or for any economic consequential damages (including lost profits or savings), even if we are informed of their possibility.

Items for Which You are Not Liable

Under no circumstances are you liable to us, our IBM Business Partners, subcontractors, or Program developers for any of the following:

1. third-party claims against us for damages (other than those under the first items listed above (injury and property damage) and claims for patent and copyright infringement);
2. special, incidental, or indirect damages or for any economic or consequential damages (including lost profits or savings, except for the profit inherent in the purchase price), even if you are informed of their possibility.

6. Changes to the Agreement Terms

Any changes to the terms of this Agreement must be signed by both parties to be valid.

7. Agreement Termination

You may terminate this Agreement on written notice directly to us or through your IBM Business Partner.

Either of us may terminate this Agreement if the other does not comply with any of its terms provided the one who is not complying is given written notice and reasonable time to comply, which period shall not be less than twenty days.

In the event that you fail, following thirty (30) days' written notice of non-payment, to pay any undisputed amount that is actually due and owing, we may terminate this Agreement.

Any terms of this Agreement which by their nature extend beyond the Agreement termination remain in effect until fulfilled, and apply to both of our respective successors and assignees.

8. Geographic Scope

All your rights and all our obligations are valid both in the country in which the transaction is performed and in the country where the Programs and Support are made available to you.

9. Governing Law

The laws of New York govern this Agreement. The United Nations Convention on Contracts for the International Sale of Goods does not apply.

Nothing in this Agreement affects any statutory rights of consumers that cannot be waived or limited by contract.

The Uniform Computer Information Transactions Act, as adopted in New York or elsewhere, does not apply to this transaction.

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Attachment for Support

These terms are in addition to those of the IBM International Agreement for Acquisition of Programs and Support, the IBM International Customer Agreement, or any equivalent agreement in effect between us. If there is a conflict among terms, those of this Attachment prevail.

We specify selected Programs in the Addendum for Support for Universal Access Programs ("Addendum for Support") to this Attachment ("Programs" for purposes of this Attachment). Support is provided only for those Programs installed within your Enterprise.

Support includes the support listed in the Addendum for Support, and may include, in general: subscription, e.g., Program updates, enhancements, preventive service or new releases; technical assistance, e.g., response to telephone inquiries concerning the installation, use, operation or function of Programs; and regulatory response, e.g., information on, or changes required by, government or other regulatory agencies.

1. Charges and Payment

The amount payable for Support will be a recurring charge. The charging period option (called "Charging Option"), e.g., monthly, annual, prepaid, is specified in the Addendum for Support.

2. Our Responsibilities

1. Support will be provided, either directly by us or through your IBM Business Partner, for a charge for a specified period of time ("Support Period") as specified in an addendum. The initial Support Period begins on the date the contract is executed.
2. Subsequent Support Periods will begin upon customers written consent on the date agreed to by the parties.

3. Your Responsibilities

You agree:

1. that when you purchase Support for a Program, you will purchase Support for all of your copies of that Program at the same location. This includes Programs you have already acquired and those you may acquire subsequently.
2. that you are responsible for the results obtained from the use of the Support, provided that this does not relieve us from complying with our contractual obligations or from providing services in accordance with applicable warranties;
3. to provide sufficient, free, and safe access to your facilities for the fulfillment of our obligations.

4. Warranty for Support

We warrant that Support will be provided:

1. using commercially reasonable care and skill;
2. according to its current description contained in the Addendum for Support; and
3. in accordance with applicable service standards as published by IBM.

The warranties will be voided by misuse, accident, modification, unsuitable physical or operating environment, operation in other than the operating environment specified in the product documentation, or failure caused by a product for which we are not responsible.

THESE WARRANTIES ARE YOUR EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

Though we will make a commercially reasonable effort to provide uninterrupted, error-free Support and to correct all deficiencies, we do not warrant uninterrupted or error-free provision of Support or that we will correct all defects.

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Addendum for Support for Universal Access Programs

The following terms are in addition to, or modify, those of the Agreement for Acquisition of Programs and Support, the Agreement for Acquisition of Support, the Attachment for Support or any equivalent agreement in effect between us.

1. LICENSED PROGRAMS FOR WHICH SUPPORT IS PROVIDED:

<u>Program Name</u>	<u>Program Number</u>
Callpath for AIX	5648-C69
DirectTalk for AIX	5765-B81

2. INITIAL SUPPORT PERIOD: One year.

3. SUBSEQUENT SUPPORT PERIOD: One Year.

4. RENEWAL: Upon Customer's written consent at end of each Support Period.

5. CHARGING PERIOD: Annual, invoiced in advance.

6. CHARGES: When you acquire Support directly from us:

- A. **Support Charge:** Charges vary according to the Programs and features chosen and are set forth in a transaction document.
- B. **Resumption Charge:** Equal to the total of all Support Charges that you would have paid during the lapsed interval had you not declined Support at the time it was offered to you or terminated and subsequently resumed Support.

7. REQUIRED NOTICE OF WITHDRAWAL OF SUPPORT BY IBM: Six months written notice required. During the initial Support Period of one (1) year under the Agreement for Acquisition of Programs and Support, we agree not to withdraw support within the contract period.

8. SUPPORT PROVIDED:

i. **Support Provided:** For the unmodified portion of the Program, and to the extent problems can be recreated in the Specified Operating Environment (if necessary to address the problem, at Customer's location), includes:

- a. **Code Corrections:** code to correct reported, substantial deviations from the Program's then applicable Specifications.
- b. **Fixes:** existing Code Corrections, restrictions or known bypasses for reported problems.
- c. **Program Updates:** periodic releases of collections of Code Corrections, Fixes and minor functional enhancements (including modifications to accommodate applicable statutory or regulatory changes) (and new releases) to the Program and documentation.

ii. **Technical Assistance - Defect-related or Usage:** a reasonable amount of remote assistance is available during IBM's normal business hours via telephone, facsimile (fax) or e-mail to respond to Defect-related or Usage questions. For example:

Available Code Corrections
Fixes
Program Updates
Installation
Setup
Use
Operation
Interpretation of the Program's results

The Technical Assistance phone numbers and the hours for which Technical Assistance is available for the specific geographies for Universal Access Support are as follows:

- a. **Phone Numbers:** phone numbers for technical assistance:
United States/Canada 1-888-SUPPORT (888-787-7678)
Rest of the World Contact your countries PSS Support Line
- b. **Support Hours:** hours for which technical assistance is available:

Support is primarily provided from 8:00 a.m. to 5:00 p.m. Monday through Friday, in the customer's time zone.

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Additional Customer Support service hours are provided based on the terms of the customer's Universal Access Maintenance and Support Agreement. For calls received outside 1st shift EST there is a paging system which allows support to be requested 24 hours a day, 7 days a week. Support for calls during non-business hours are determined by the support level purchased. Production problems and critical business emergencies (customer severity 1 identification) are responded to by resources on call. Additional resources are contacted as deemed necessary.

Additional information can be viewed in the IBM Software Support handbook at the following URL:

<http://ps.software.ibm.com/>

* IBM is not responsible for unavailability to Internet sites due to technical difficulties.

9. OPTIONAL SUPPORT AT AN ADDITIONAL CHARGE

- i. **Training Course Option:** Under this option, we provide class instruction and proprietary educational materials at designated locations or at a location of your request. Details of available Universal Access Education courses can be viewed at the following URL:

<http://www.ibm.com/software/telephony>

* IBM is not responsible for unavailability to Internet sites due to technical difficulties.

- ii. **Extended Support Availability:** Under this option, Technical Assistance is provided 24 hours a day, 7 days a week either by us or through a Business Partner. These services may not be available in every country.*
- iii. **Expedited Distribution -** Distribution is available via e-mail or Web site of available Code Corrections, Fixes or Program Updates.
- iv.

10. SUPPORT TRANSFERABILITY: None transferable outside of the Federated Enterprise.

11. **TECHNICAL REPRESENTATIVES:** You agree to limit communication between us to three Technical Representatives per location whose names you will provide to our Support Center.

12. OTHER TERMS AND CONDITIONS:

You may terminate Support upon one month's written notice to IBM.

In the event you terminate this Agreement due to our material breach, we agree to refund to you, on a pro-rata basis, the amount of the Support fee for the remaining, unused portion of the Support Period.

You may terminate the portion of this contract providing CallPath support without termination charge if you desire to purchase this service from another provider during the term of this agreement (1/1/01-12/31/01).